

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000486-001 DT

09/29/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

H. Beal

Deputy

STATE OF ARIZONA

KENT C KEARNEY

v.

SUSAN LOUISE SCHMITZ (001)

SIMONE ANNE ATKINSON

PHX MUNICIPAL CT

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 4236623/14002263-01.

Defendant-Appellant Susan Louise Schmitz (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying her Motion To Suppress, which alleged the officers did not have reasonable suspicion to stop her vehicle. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On August 28, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2), and failure to drive in one lane, A.R.S. § 28-729(1). Prior to trial, Defendant filed a Motion To Suppress that alleged the officers did not have reasonable suspicion to stop her vehicle because they did not personally observe her commit any civil or criminal traffic violations. The State filed a response contending a civilian witness had told the officers Defendant had committed certain traffic violations.

At the hearing on Defendant's motion, Officer Troy Webb testified he was assisting two other officers (Officer Sweeney and Officer Zintak) in a traffic stop on August 28, 2010, when a white vehicle drove by, and then another vehicle drove up. (R.T. of Feb. 14, 2011, at 8, 10-11.) A person in this second vehicle, referring to the driver of the white vehicle, said something to the effect of, she is drunk, she is all over the road, and she ran a red light. (*Id.* at 10, 17.) Officer Webb described this civilian witness as a white male with brown hair and a dark button-up shirt. (*Id.* at 11.) Officer Webb told the other officers he would attempt to stop the white vehicle and proceeded after it. (*Id.*) He was able to catch up to the white vehicle approximately $\frac{3}{4}$ of a mile down the road. (*Id.* at 11, 15.) Officer Webb identified Defendant as the driver of the white vehicle. (*Id.* at 9, 13.) Officers Sweeney and Zintak arrived "right behind" Officer Webb, as did

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the civilian witness. (*Id.* at 11–13.) Officer Sweeney asked Officer Webb to speak to the civilian witness. (*Id.* at 12.) The civilian witness gave Officer Webb his contact information, which included his name, occupation, and driver’s license. (*Id.* at 14, 15.) Officer Webb acknowledged he did not see Defendant commit any traffic violations. (*Id.* at 15.)

Officer John Sweeney testified he was conducting a traffic stop at 2:56 a.m. on August 28, 2010, when a white Prius drove by, and then another vehicle stopped next to them. (R.T. of Feb. 14, 2011, at 19–20.) The driver of that second vehicle said the driver of the white vehicle was “DUI, she was all over the road and ran a red light.” (*Id.* at 20.) The driver also said he and his passengers would stay in the area so the officers could speak to them. (*Id.* at 21.) Officers Sweeney and Zintak returned to their vehicle and followed after the white vehicle. (*Id.* at 20–21.) By the time Officers Sweeney and Zintak arrived, Officer Webb had already stopped the white vehicle, so Officer Sweeney did not observe any traffic violations. (*Id.* at 22, 24–25.) Officer Sweeney identified Defendant as the driver of the white vehicle. (*Id.* at 23.) The driver of that second vehicle arrived right after Officers Sweeney and Zintak arrived. (*Id.* at 23.) After arguments, the trial court noted the civilian witness identified himself and made himself available to the officers, and found the civilian witness had given the officers sufficient information to give them legal authority to make the stop. (R.T. of Feb. 14, 2011, at 38–41, 42–43.) The trial court therefore denied Defendant’s Motion To Suppress. (*Id.* at 38.)

Defendant then submitted the matter on the record. (R.T. of Feb. 14, 2011, at 43.) The State moved to dismiss the civil traffic violation, which the trial court granted. (*Id.* at 47.) The record included a report showing Defendant’s BAC was 0.137. (*Id.* at 59.) The trial court found Defendant guilty of both DUI charges. (*Id.*) On March 24, 2011, the trial court imposed sentence. On that same date, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE INFORMATION FROM THE CIVILIAN WITNESS AND THE CIRCUMSTANCES OF THE GIVING OF THAT INFORMATION GAVE THE OFFICERS REASONABLE SUSPICION TO STOP DEFENDANT’S VEHICLE.

Defendant contends the trial court abused its discretion in finding the officer had reasonable suspicion to stop her vehicle. In reviewing a trial court’s ruling on a motion to suppress, an appellate court is to defer to the trial court’s factual determinations, but is to review de novo the trial court’s legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect the person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985). The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer’s presence. A.R.S. § 28–1594; A.R.S. § 13–3883(B). In this case, the civilian witness told the officers Defendant had run a red light, which would be a traffic vio-

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lation, and told the officers Defendant was DUI, which also would be a traffic violation if true. Defendant contends, however, that the civilian witness was an “unknown individual” or an “unidentified person” and thus the information from this person was not sufficient to establish reasonable suspicion.

Under Arizona law, an officer may arrest a suspect for DUI based on information from a civilian witness, even when the officer has not personally observed the suspect driving. *State ex rel. McDougall v. Superior Ct. (Seidel)*, 191 Ariz. 182, 186, 953 P.2d 926, 930 (Ct. App. 1997) (officer had probable cause to arrest obviously intoxicated person based on statement of civilian witness that she had observed that person driving, even when the officer never saw that person driving); *State v. Robles*, 171 Ariz. 441, 443, 831 P.2d 440, 442 (Ct. App. 1992) (officers had reasonable suspicion for investigatory stop of person based on statement of civilian witness that he had observed that person driving erratically, even when officer never saw that person driving erratically); *Pharo v. Tucson City Ct.*, 167 Ariz. 571, 572–73, 810 P.2d 569, 570–71 (Ct. App. 1990) (officers had reasonable suspicion for investigatory stop of person based on statements of two separate civilian witnesses that they had observed person driving erratically, even when officers never saw that person driving erratically). Further, a civilian witness who voluntarily gives information to the police is presumed to be reliable and presumed to give reliable information. *State v. Lawson*, 144 Ariz. 547, 552, 698 P.2d 1266, 1271 (1985) (truck driver told inspector at agricultural inspection station that people in certain car had attempted to sell him drugs and female passenger had offered sexual services); *State ex rel. Flournoy v. Wren*, 108 Ariz. 356, 364, 498 P.2d 444, 452 (1972) (“Where an ordinary citizen volunteers information which he had come upon in the ordinary course of his affairs, completely free of any possible gain from furnishing the information, reliability is enhanced”); *State v. Diffenderfer*, 120 Ariz. 404, 406, 586 P.2d 653, 655 (Ct. App. 1978) (information from woman who had come to defendant’s home to collect rent and saw marijuana growing behind house was presumed to be reliable).

Finally, information received from a civilian witness who identifies himself or herself, as opposed to information received from an anonymous informant, has enhanced reliability:

The State suggests no criteria that would distinguish a citizen complaint from an anonymous tip and place a 911 call in the first category rather than the second. Justice Kennedy’s concurring opinion in *J.L.*, however, gives some help in this regard. In a “truly anonymous” phone call, Justice Kennedy observed, “the informant has not placed his credibility at risk and can lie with impunity.” Insofar as could be told from the record, the informant in *J.L.* was such a person; there was no recording of the call, and nothing was known about the caller. Similarly, there is no indication in *Altieri* that the informant was traceable; the court described the caller as an anonymous informer and gave no further detail.

This was not such a call. Here, although the 911 operator did not ask the caller her name and the caller did not offer it, the phone call was recorded, and it is apparent from the recording that she was calling from her home. One who dials 911 from a private phone is traceable, and does place credibility at risk in a way that an unidenti-

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fiable caller from a public phone does not. *Cf. J.L.* at 1380–81 (suggesting that a different reliability assessment might be warranted where the phone call can be traced).

By making a traceable call from her home phone, this caller placed her credibility at risk in a manner comparable to the unidentified truck driver in *Lawson* who stopped at an agricultural inspection station and gave the inspector the license number of a vehicle whose occupants had offered to sell him sexual services and drugs. Just as the *Lawson* truck driver was traceable and identifiable, presumably through his license number, so was the 911 caller in this case. And just as the truck driver’s report qualified for the “enhanced reliability” of information volunteered by a disinterested private citizen, so does the information volunteered by the caller in this case.

State v. Gomez, 198 Ariz. 61, 6 P.3d 765, ¶¶ 16–18 (Ct. App. 2000) (citations omitted). It thus appears what gives the “enhanced reliability” is the civilian witness’s placing his or her credibility at risk. *See also In re. Roy L.*, 197 Ariz. 441, 4 P.3d 964, ¶ 10 (Ct. App. 2000) (person giving information was fellow student who had personally given information about juvenile to school security guard).

In the present case, there are two factors showing the enhanced reliability of the information the officers received. First, the information about Defendant’s driving came from an ordinary citizen who volunteered information that he had come upon in the ordinary course of his affairs, completely free of any possible gain from furnishing the information. And second, the civilian witness identified himself to the officer by giving his name and occupation, and showing the officer his driver’s license, thereby placing his credibility at risk. And finally, the report of weaving, DUI, and running a red light was information of traffic violations. Based on the totality of the circumstances, the trial court correctly found the officers had reasonable suspicion to stop Defendant’s vehicle, and thus correctly denied Defendant’s motion to suppress.

For authority, Defendant cites *State v. Altieri*, 191 Ariz. 1, 951 P.2d 866 (1997), wherein the court said the following:

Although an anonymous tip may, in some circumstances, be sufficient to support a stop, the tip must show sufficiently detailed circumstances to indicate that the informant came by his information in a reliable way. If the tip itself fails to provide sufficient underlying circumstances demonstrating the reliability of the information, the reliability may be supplied by independent observations of the police corroborating the information in the tip. Nevertheless, the tip must contain “a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.”

. . . In this case, officers did not know the caller’s identity, veracity or basis of knowledge. Moreover, the tip merely provided current information which could have been obtained by anyone who observed the defendant and knew or heard his first name. Nothing confirmed the bare allegation that defendant was carrying contraband. Such corroboration of the tip as was observed by the officers was unrelated to any criminal activity.

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Altieri at ¶¶ 9–10 (citations omitted). The court thus concluded the corroboration did not sufficiently substantiate the reliability of the tip, and thus the officers lacked reasonable suspicion to support the vehicle stop. *Altieri* at ¶ 14. A similar situation existed in *State v. Canales*, 222 Ariz. 493, 217 P.3d 836 (Ct. App. 2009), where the court said the following:

However, this conclusion does not end our analysis. We must also determine whether the detention was supported by reasonable suspicion, which is “a justifiable suspicion that the particular individual to be detained is involved in criminal activity.” Canales contends the anonymous citizen’s telephone tip was insufficient to justify the investigatory stop and Audetat personally had not observed any behavior that would have created reasonable suspicion of criminal activity. To support his argument Canales relies on *State v. Altieri*, in which our supreme court held that an anonymous tip about criminal activity was insufficient to support reasonable suspicion.

....
The state argued *Altieri* was distinguishable because the tip had been provided by a “‘citizen complaint’ rather than a mere ‘anonymous tip.’”

....
The common thread in these cases is that an anonymous tip is not a sufficient and independent basis for reasonable suspicion unless it is “reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” The tip here does not satisfy this requirement. According to Deputy Audetat, the caller reported suspicious activity in the parking lot of an apartment complex and gave a description of the suspicious vehicle and its license plate. The caller apparently was concerned that the occupant of the vehicle was “possibly preparing” to burglarize other vehicles in the area. And, although Audetat was able to locate a vehicle that fit the general description and had a license plate number close to that given, standing alone, the tip provided no reliable information to support a reasonable suspicion that the vehicle’s occupant was engaging in criminal activity.

Canales at ¶¶ 9, 13, 16. Both *Altieri* and *Canales* are distinguishable, however, because they involved an anonymous tip, while in the present case, the civilian witness gave his information to the officers while speaking face-to-face with them and gave them his name, occupation, and driver’s license. As such, the present case is controlled by *Gomez* rather than *Altieri* or *Canales*.

Defendant contends, however, the officers did not obtain name, occupation, and driver’s license of the witness until after they had stopped her. She thus contends that whatever reliability those factors added did not come into being until after the officer had stopped her and therefore did not make this “anonymous” information into reliable information prior to the stop. In the present case, however, before the officers left the area in their attempt to stop Defendant, the civilian witness told the officer he would stay in the area and thus make himself available to them:

They also stated they would stay in the area so I could speak to them.

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(R.T. of Feb. 14, 2011, at 21.) The civilian witness accompanied the officers to the stop and thus placed his credibility at risk in a manner comparable to the unidentified truck driver in *Lawson*, the desk clerk in *Flournoy*, the landlady in *Diffenderfer*, and the 9-1-1 caller in *Gomez*.

Defendant contends *Pharo* is entirely distinguishable because in *Pharo* “there were two separate cars that stopped and told the officers the same information and one of those cars had actually written down the license number of the offending vehicle.” (Appellant’s Opening Memorandum at 7–8.) In *Robles*, the court rejected this same argument:

The fact that there was only one report of erratic driving, rather than two as in *Pharo*, is not a critical distinction, nor is the fact that the police had neither a license number nor a description of the driver. The description of the vehicle was sufficiently distinctive that this, coupled with the time of day and the likely absence of a significant amount of traffic, provided an objective basis for the officers to conclude that Robles’ vehicle was the truck described in the dispatcher’s report.

Robles, 171 Ariz. at 443, 831 P.2d at 442. Moreover, the officers never lost sight of Defendant’s vehicle, so there was no need for a license number.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly denied Defendant’s Motion To Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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